A **SHELL MALAYSIA TRADING SDN BHD**

v.

COLLECTOR OF STAMP DUTY, PENANG

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ZAINUN ALI JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-02-1241-2006]
C 7 APRIL 2009

REVENUE LAW: *Stamp duty - Assessment - Appeal against - Preliminary issue raised - Stamp duty imposed on appellant less than RM250,000 - Whether prior leave of Court of Appeal required - Courts of Judicature Act 1964, s. 68(1)(a)*

D The trustees of a trust corporation (Leong San Tong Khoo Kongsi (Penang) were the registered owners of a parcel of land ('the land'). The trustees had granted a company, Farlim Group (Malaysia) Bhd, a lease of the land. Farlim Group, under a E sublease agreement, had subleased the land to the appellant, Shell Malaysia Trading Sdn Bhd. The sublease agreement was presented to the respondent, the Collector of Stamp Duty, Penang, for adjudication as to the stamp duty chargeable pursuant to s. 36 of the Stamp Act 1949 ('the Act'). By a notice of assessment, the F respondent notified the appellant that the stamp duty chargeable was RM87,542 charged pursuant to item 49(b) of the First Schedule of the Act. The appellant was aggrieved by the assessment, contending that the sum of RM2,837,215 payable G under the sublease agreement was 'rental' and not 'premium' and therefore the stamp duty should be chargeable under item 49(a) (rent) of the First Schedule of the Act, and not under item 49(b) (premium) of the same. The appellant, through their solicitors, paid the stamp duty of RM87,542 under protest to the collector. H Subsequently, the appellant appealed to the High Court by way of a case stated pursuant to s. 39(1) of the Act. The High Court dismissed the appellant's appeal and upheld the respondent's assessment of the stamp duty payable on the sublease agreement. Dissatisfied with the decision of the High Court, the appellant I appealed to this court. At the commencement of the hearing of this appeal, a preliminary issue was raised as to whether or not prior leave of the Court of Appeal pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964 ('CJA') was required for the

purpose of the present appeal, considering that the stamp duty imposed by the Collector on the appellant was only RM87,542, a sum way below RM250,000.

Held (dismissing the appeal)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) What moved the appellant to appeal to the High Court was the imposition by the Collector of a stamp duty of RM87,542. Therefore, this must be taken to be the subject matter of the appeal before the High Court as well as the subject matter of the appeal before this court. This amount of RM87,542 was less than RM250,000. Therefore, prior leave of the Court of Appeal was required by virtue of s. 68(1) of the CJA. Since there was no prior leave, the appeal was therefore incompetent. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Pemegang-pemegang amanah satu perbadanan amanah (Leong San Tong Khoo Kongsi (Penang) adalah pemilik-pemilik berdaftar sebidang tanah ('tanah'). Pemegang-pemegang amanah telah memberi kepada sebuah syarikat, Farlim Group (Malaysia) Bhd, satu pajakan tanah itu. Farlim Group, di bawah perjanjian pajakan kecil, telah memberi pajakan kecil tanah itu kepada perayu, Shell Malaysia Trading Sdn Bhd. Perjanjian pajakan kecil telah dikemukakan kepada responden, Pemungut Duti Setem, Penang, untuk penghakiman mengenai bayaran duti setem di bawah s. 36 Akta Setem 1949 ('Akta'). Melalui notis taksiran, responden memberitahu perayu bahawa bayaran duti setem adalah RM87,542 mengikut item 49(b) Jadual Pertama Akta. Perayu terkilan dengan taksiran, dan berhujah bahawa amaun RM2,387,215 yang perlu dibayar di bawah perjanjian pajakan kecil adalah 'sewaan' dan bukan 'premium' dan oleh itu duti setem seharusnya dikenakan bayaran di bawah item 49(a) (sewaan) Jadual Pertama Akta, dan bukan di bawah item 49(b) (premium). Perayu, melalui peguamcara, membayar duti setem RM87,542, di bawah bantahan kepada pemungut. Kemudiannya, perayu merayu kepada Mahkamah Tinggi melalui kes yang dinyatakan di bawah s. 39(1) Akta. Mahkamah Tinggi menolak rayuan perayu dan menyokong taksiran responden mengenai bayaran duti setem perjanjian pajakan kecil itu. Tidak puas hati dengan keputusan Mahkamah Tinggi, perayu merayu kepada mahkamah ini. Di permulaan perbicaraan rayuan ini, isu

awalan dibangkitkan sama ada kebenaran terdahulu Mahkamah Rayuan di bawah s. 68(1)(a) Akta Mahkamah Kehakiman 1964 ('AMK') diperlukan untuk tujuan rayuan ini, mengambilkira bahawa duti setem yang dikenakan oleh pemungut ke atas perayu hanyalah RM87,542, amaun di bawah RM250,000.

Diputuskan (menolak rayuan)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Apa yang membuatkan perayu membuat rayuan ke Mahkamah Tinggi adalah pengenaan oleh pemungut mengenai duti setem yang berjumlah RM87,542. Oleh itu, ini adalah halperkara rayuan di hadapan Mahkamah Tinggi dan juga halperkara rayuan di hadapan mahkamah ini. Jumlah RM87,542 adalah kurang daripada RM250,000. Oleh itu, kebenaran terdahulu Mahkamah Rayuan diperlukan oleh kerana s. 68(1) AMK. Oleh kerana tidak terdapatnya kebenaran terdahulu, rayuan adalah tidak kompeten.

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a)
Stamp Act 1949, ss. 36(1), 39

For the appellant - Felix Raj (Simon Hong with him); M/s Shaikh David Raj
For the respondent - Norhisham Ahmad (Ruzaidah Yaacob with him); Inland Revenue Board

[Appeal from High Court, Penang; Originating Motion No: 25-6-1996]

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Penang of 20 July 2004.

[2] On 20 July 2004 the High Court of Penang had dismissed the appellant's appeal to the High Court against an assessment by the Collector of Stamp Duty, Penang (the respondent) (in this judgment shall be referred to as the Collector), on a sub-lease

agreement pursuant to s. 36(1) of the Stamp Act 1949 ('the Act'). The appeal was by way of a case stated pursuant to s. 39 of the Act. In dismissing the appeal, the High Court upheld the collector's assessment of the stamp duty payable by the appellant on the sub-lease agreement.

[3] We have unanimously dismissed this appeal with costs. We now give our grounds.

[4] Briefly, the background facts that led to the appeal proceeding before the High Court are as follows.

[5] The trustees of a trust corporation known as Leong San Tong Khoo Kongsi (Penang) (incorporated under the Trustees (Incorporation) Ordinance 1952) are the registered owners of a parcel of land situated in the District of Timur Laut, Penang ('the land').

[6] On 17 June 1995 the trustees granted a company, Farlim Group (Malaysia) Bhd, a lease of the land for a period of 99 years. The lease, however, was to take effect retrospectively, that is to say, with effect from 15 June 1993.

[7] Earlier, prior to 17 June 1995, that is to say, on 6 June 1995, the lessee, Farlim Group, under a sub-lease agreement, had sub-leased the land to the appellant, Shell Malaysia Trading Sdn Bhd for a term of 60 years. This period of 60 years was to commence from the date of the presentation of the sub-lease for registration with the land office, Penang. The consideration for the sub-lease was RM2,837,215. This sum was to be paid by the appellant in stages. The first payment was the sum of RM283,721.50 payable upon the execution of the sub-lease agreement. The balance sum of RM2,553,493.50 was to be paid within 14 days of the date the appellant:

(a) being notified that the squatters on the land had vacated the land; or

(b) being notified that the approval of the relevant authority for the appellant to use the land as a petrol station had been obtained,

[8] whichever, is the later. It was further provided for in the sub-lease agreement that in the event that the approval from the relevant authority was not obtained within the period prescribed

in the sub-lease agreement, then, either party was at liberty to terminate the sub-lease agreement; and in the event that one of the parties were to terminate the sub-lease agreement, then, the sub-lessor shall forthwith refund to the appellant all sums received free of interest.

[9] On 17 October 1995 the sub-lease agreement was presented to the respondent, the Collector of Stamp Duty, Penang, for adjudication as to the stamp duty chargeable pursuant to s. 36 of the Act.

[10] Section 36(1) of the Stamp Act provides:

> Mode of adjudication as to proper stamp
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> 36. (1) When any executed instrument, other than an instrument which by virtue of section 47, cannot be stamped after execution, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty, if any, with which it is chargeable, and pays a fee of ten ringgit, the Collector shall assess the duty, if any, with which in his judgment the instrument is chargeable.

[11] By a notice of assessment dated 30 October 1995, the respondent notified the appellant that the stamp duty chargeable was RM87,542 charged pursuant to item 49(b) of the First Schedule of the Act.

[12] The appellant was aggrieved by the assessment contending that the sum of RM 2,837,215.00 payable under the sub-lease agreement was 'rental' and not 'premium' and therefore the stamp duty should be chargeable under item 49(a) (rent) of the First Schedule of the Act, and not under item 49(b) (premium) of the same. If the charge had been imposed under item 49(a) of the First Schedule of the Act, then the stamp duty payable would have been lower.

[13] On 17 January 1996 the appellant, through their solicitors, paid the stamp duty of RM87,542.00 under protest to the collector.

[14] Subsequently, the appellant appealed to the High Court by way of a case stated pursuant to s. 39(1) of the Act. This provision states:

Appeal to High Court

39. (1) Any person who is dissatisfied with the assessment of the Collector may, within twenty-one days after the date of the assessment and upon payment of duty in conformity therewith, appeal against the assessment to the High Court, and may for that purpose require the Collector to state and sign a case, setting forth the question upon which his opinion is required, and the decision made by him.

(2) The Collector shall thereupon state and sign a case and deliver to the same to the person by whom it is required, and the case may, within seven days thereafter or within such further time as the Court may allow, be set down by him for hearing.

(3) Upon the hearing of the case the Court shall determine the question submitted, and, if the instrument in question is in the opinion of the Court chargeable with any duty, shall assess the duty with which it is chargeable.

(4) If it is decided by the Court that the assessment of the Collector is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.

(5) If the assessment of the Collector is confirmed the Court may make an order for payment to the Collector of the costs incurred by him in relation to the appeal.

[15] The questions submitted by the collector by way of a case stated for the opinion of the High Court are:

(a) Whether the sub-lease agreement dated 6 June 1995 presented for adjudication is liable to duty as assessed by the collector of Stamp Duty?

(b) If not, to what duty is it liable?

[16] On 20 July 2004 the High Court dismissed the appellant's appeal and upheld the respondent's assessment of the stamp duty payable on the sub-lease agreement.

[17] Dissatisfied with the decision of the High Court, the appellant appealed to this court.

[18] Before us it is the contention of the appellant that it was legally wrong for the collector to have imposed a stamp duty chargeable pursuant to item 49(b) of the First Schedule of the Act as if the payment under the sub-lease agreement was a 'premium'. The appellant submitted that the consideration payable under the sub-lease agreement was 'rental' and as such it was chargeable under item 49(a) of the same Schedule which attracts a lower stamp duty.

[19] At the commencement of the hearing of this appeal, on our own volition, we directed the parties to submit before us on the preliminary issue as to whether or not prior leave of the Court of Appeal pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964 ('CJA') was required for the purpose of the present appeal, considering that the stamp duty imposed by the collector on the appellant was only RM87,542.00, that is to say, a sum way below RM250,000.

[20] Section 68(1)(a) of the CJA provides:

> Non-appealable matters
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> 68. (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
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> (a) When the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

[21] The learned counsel for both sides informed the court that they were taken by surprise by this preliminary issue raised by us and that they needed more time to submit on the matter. Accordingly we adjourned the hearing to the following day, that is, to 7 April 2009.

[22] On the following day, the learned counsel of both sides submitted that no leave was required for the purpose of the appeal.

[23] Encik Felix Raj, the learned counsel for the appellant, submitted that no leave of the Court of Appeal pursuant to s. 68(1)(a) of the CJA was required as the matter came before the High Court by way of a case stated pursuant to s. 39 of the Stamp Duty Act and hence there was no 'claim' made before the High Court. According to learned counsel, what was before the High Court were merely the two questions posed.

[24] Encik Norhisham, the learned counsel for the defendant also submitted that no leave was required, but for a different reason. According to learned counsel, the subject-matter of the appeal was not the amount of stamp duty payable (that is, RM87,542) but the consideration under the sub-lease agreement, and that was RM2,837,215; and hence the subject-matter was a sum far in excess of RM250,000.

[25] At the outset we wish to point out that it is not correct to say that the case stated, as submitted by the collector for the purpose of the appeal to the High Court, only contains the two questions posed to the High Court. The two questions for the High Court's determination are found only in the last paragraph of the case stated, that is to say, at para. 11. The preceding ten paragraphs of the case stated set out the background facts that led to the assessment including specifying the sub-lease agreement in question. The case stated also mentions about the amount of stamp duty charged, that is, RM87,542; and specifies the particular item of the First Scheduled (ie, item 49(b)) considered by the collector to be applicable to the document in question, and the reason for charging under the said item. The case stated also states the reason why the appellant was objecting to the assessment.

[26] With respect, we are unable to agree with the submissions of both learned counsel on the issue regarding leave. In our view, what moved the appellant to appeal to the High Court was the imposition by the collector of a stamp duty of RM87,542. Therefore, in our view, this must be taken to be the subject-matter of the appeal before the High Court as well as the subject-matter of the appeal before us. This amount of RM87,542 is less than RM250,000. Therefore, prior leave of the Court of Appeal is required by virtue of s. 68(1)(a) of the CJA. Since there was no prior leave, the appeal was therefore incompetent and accordingly we dismissed it.

[27] We only ordered a nominal cost in that the deposit is to be paid to the respondent as costs.

Appeal dismissed with costs.